83854-2
NO. 36921-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant,

v.

CROWN CORK & SEAL,

Respondent.

REPLY BRIEF OF APPELLANT DEPARTMENT OF LABOR AND INDUSTRIES

ROBERT M. MCKENNA
Attorney General

NATALEE RUTH FILLINGER
Assistant Attorney General
WSBA# 31436
P.O. Box 40121
Olympia, WA 98504-0121
(360) 586-7713

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I. INTRODUCTION

The central point of the opening brief of the Department of Labor and Industries (Department), was that an employer cannot satisfy the "previous bodily disability" standard of RCW 51.16.120, as to a particular medical condition, where the evidence is undisputed that the worker was fully able to do her job, notwithstanding the medical condition, prior to the "second" injury that led to pension status. AB 15-23. Self-insured employer, Crown Cork and Seal Company (Crown), responds with the argument, essentially, that the preexisting medical condition need have no affect on the worker's prior ability to do her job, so long as the condition interfered with any "ordinary pursuits of life," however minimal. RB 8-14.

Crown is wrong on this question of law, and the trial court decision therefore must be reversed. There is no proof of a substantial negative affect by Ms. Smith's preexisting wrist condition on her ability to do her physically demanding, assembly line job. Crown does not meet the narrow exception to employer responsibility under RCW 51.16.120's test for "previous bodily disability."

II. ARGUMENT IN REPLY

A. Crown Fails To Present Any Meaningful Response To The Department's Legislative Policy Arguments.

In its opening brief, the Department began by pointing to legislative policy concerns implicated by the low threshold set for eligibility under RCW 51.16.120 by the trial court. AB 15. The Department noted that the lower the threshold placed on second-injury fund relief, the more the expense of administering the scheme outweighs any useful purpose of that scheme. AB 15.

Crown's only response to this argument conclusorily suggests that the threshold is already established by appellate court and Board precedent purportedly supporting Crown's suggested standard that would define "previous bodily disability" as any medical condition that interferes with ordinary pursuits of life. RB 13. Crown thus urges that there is no need for this Court to consider legislative policy concerns. RB 13. However, Crown's would-be threshold is supported only by a few scattered Board decisions (at best), and more importantly, Crown's proposed standard would make the second-injury fund test so easy to meet that it would be essentially no standard at all.

This is similar to the circumstance in *Jussila v. Department of Labor & Industries*, 59 Wn.2d 772, 778, 370 P.2d 582 (1962), where the

Supreme Court rejected an employer's effort to secure a broad presumption of second-injury fund eligibility in a different context under the statute (i.e., the "but for" question that is not separately posed here). The Court in *Jussila* expressly recognized (1) that Title 51 RCW must be construed in light of the general legislative rule under the Industrial Insurance Act that each individual employer must pay its own way, and (2) that second-injury fund relief is an exception to that rule:

> The basic premise of the Work[ers'] Compensation Act is that industry is to bear the burden of the costs arising out of industrial injuries sustained by its employees. Each employer's premium should reflect his own cost experience in order to reward, and thereby encourage, safety, as well as to avoid an unfair burden on other employers. The Second-injury Fund law would conflict with this general principle if appellant's contention should prevail.

Jussila, 59 Wn.2d at 779 (citations omitted). The reference in *Jussila* to *premium* payments does not apply to self-insured employers such as Crown. But the same principle that second-injury fund eligibility is a narrowly limited exception to the general rule of employer responsibility equally applies to self-insurers.

The Department's administrative construction of the "previous bodily disability" standard is consistent with this general concern expressed in *Jussila*. Nowhere in its Brief of Respondent does Crown dispute that the Department's interpretation of the narrow exception to

employer responsibility in RCW 51.16.120 is entitled to deference. *See* AB 12.

B. The *Rothschild* Court's Explanation That The Worker Was Doing "Everything Required Of A Longshoreman" Cannot Be Ignored.

As a central point in its opening brief, the Department noted that in *Rothschild v. Department of Labor & Industries,* 3 Wn. App. 967, 969, 478 P.2d 759 (1971), the Court of Appeals rejected an employer's argument under RCW 51.16.120 that a worker had a "previous bodily disability" at the time of injury. *E.g.*, AB 13, 16-18. The *Rothschild* Court found it important to its decision that the worker, while he had incurred, in a long working career, numerous injuries and medical conditions, nonetheless "was doing 'everything' required of longshoreman" at the time of the subsequent injury. *Rothschild,* 3 Wn. App. at 969.

Crown seeks to dismiss the decision in *Rothschild* as turning only on the Court's assessment that the worker's medical condition was wholly latent prior to the date of the injury that led to pension status. RB 12-13. But if that were the sole basis for rejecting the employer's "previous bodily disability" argument in that case, and if ability to do one's job were not critical to the analysis, the Court would have simply stated that the

condition was latent at the time of the injury. The Court would not have addressed the fact that the worker had previously been "doing 'everything' required of a longshoreman."

As the Department pointed out in its opening brief, in several decisions the Board has ruled that the concept of disability in this context connotes lost earning power. AB 16-18 (discussing *In Alfred Funk*, BIIA Dec., 89 4156, 1991 WL 87432 (1991); *In re Curtis Anderson*, Dckt. No. 88 4251, 1990 WL 310624 (June 15, 1990)). These Board rulings are consistent with the quoted passage from *Rothschild* and with the *Jussila* principle that second-injury fund relief is a narrow exception to employer responsibility. The Board decisions are also consistent with a non-second injury fund case, *Henson v. Department of Labor & Industries*, 15 Wn.2d 384, 391, 130 P.2d 885 (1942), noting that disability connotes lost earning capacity. AB 19.

Under *Rothschild* and the Board decisions in *Funk* and *Anderson*, full ability to do one's job at the time of the subsequent injury, an ability possessed here by Ms. Smith, precludes second-injury fund relief for the employer. Only by proving that a preexisting medical condition substantially effected a worker's ability to do her job does the employer meet the narrow second-injury fund test for "previous bodily disability."

C. Merely Showing That A Condition Interfered With A Claimant's "Ordinary Pursuits of Life" Is Insufficient To Prove Second-Injury Fund Eligibility.

In a few decisions, the Board has looked beyond employment to daily non-work functioning when interpreting RCW 51.16.120's "previous bodily disability" standard. *See In Marshall Powell*, BIIA Dec., 97 6424, 1999 WL 756228 (1999); *In re Leonard Norgren*, BIIA Dec., 04 18211, 2006 WL 481048 (2006). To the extent that any such Board decision suggests that this inquiry can be done in isolation and without also looking at the vocational impact of a prior medical condition, this is an erroneous expansion of the concept of disability under the narrow exception to employer responsibility in RCW 51.16.120 and under *Rothschild.* Crown misplaces reliance on *Powell* and *Norgren.*

As will be shown below in this section, these two Board cases that appear to expand the "previous bodily disability" standard by looking at aspects of a worker's personal life are of no avail to Crown. That is because in those cases the pre-existing medical conditions were much more serious, and therefore the inference can be drawn that the conditions impacted the worker's ability to do his or her job, as well as activities outside of work.

In *In re Marshall Powell,* 1999 WL 756228 (1999), the worker was an insulin dependent diabetic for twenty years. At the time of his

"second" injury, he suffered from symptoms of peripheral neuropathy in both feet as a result of his diabetes. *Id.* at 5. He suffered from elevated blood sugars even with his insulin therapy. *Id.*

The Board stated that "while the record is devoid of *specific* information about whether the diabetes, and visits to his doctors for the diabetic condition, caused Mr. Powell to *miss any work*, we still find the evidence sufficient to conclude that the diabetes was disabling to Mr. Powell prior to the 1983 industrial injury. *Id.* After discussing the medical evidence, the Board continued: "We conclude that the need for monitoring diet and insulin level, and the peripheral neuropathy in both feet, had to have substantially and negatively impacted Mr. Powell's functioning and efficiency." *Id.* at 5-6.

The Board's discussion, quoted above, suggests that the Board was inferring, notwithstanding the absence of "specific" evidence on the point, that the diabetic condition did have a "*substantial*[] *and negative*[]" impact on Mr. Powell's ability to do his custodian job, as well as on his daily living activities outside the work place. *Id.*[1] For Ms. Smith, on the other hand, no similar inference of limited capacity to do her job due to her

[1] Crown misses the point when it asserts: "Mr. Powell was able to perform his duties as a janitor at the time of his industrial injury. Obviously, one must be able to perform his or her job duties at the time of the industrial injury. If he or she were not on the job, there would be no industrial injury and no second injury fund situation." RB 10. Just because a worker is on the job does not mean that the worker is at full capacity, is not limited in some tasks, or does not need special accommodation.

bilateral wrist condition (hereafter, "wrist condition") can be drawn from the evidence because the *express* evidence was directly to the contrary. AB 5-6. In *In re Leonard Norgren,* BIIA Dec., 04 18211, 2006 WL 481048 (2006), the Board relied on the analysis in *Jussila* and *Henson*, and denied the employer second-injury fund relief. The Board found that before his industrial injury, Norgren had numerous conditions: a neck condition, hearing loss, glaucoma, and a knee condition. *Id.* at 9.

These conditions, however, "did not have any negative effect on his ability to work, his social relationships, or activities of his daily living." *Norgren, at 8.* The Board correctly concluded, as it did here, that these pre-existing conditions did not constitute a "previous bodily disability" under RCW 51.16.120 and denied the employer second-injury fund relief. *Id. at 9.*

Leonard Norgren worked for the Rainier Brewery for thirty-seven years as a forklift operator, delivery truck driver, and relief foreman. *Id.* *3. Anticipating the closure of the Rainier Brewery, Norgren took a night job driving a truck which delivered bundles of newspapers for carriers to pick up and deliver to houses.

Norgren held both jobs for 7 years, working as much as 80 hours per week during the years leading up to his industrial injury. *Id.* Like Ms. Smith, Norgren rarely missed work. *Id.* CABR Gorker 14 (re

Ms. Smith).[2] Unlike Ms. Smith, however, prior to Norgren's final industrial injury, he suffered from at least one pre-existing condition, a bad right knee, that was so bad that surgery had been recommended, but Norgren declined the surgery.[3]

Instead, when Norgren's knee pain became too great, he went to the doctor and received cortisone injections. The Board's decision does not explicitly state how many times Norgren sought medical attention for his knee, but it appears to have occurred on multiple occasions.[4]

Notably, all of Norgren's job duties, except possibly those of a relief foreman, would have required extensive use of his right leg and knee to drive, the same knee that was so bad it required surgery and on-going treatments. *Id.* Presumably, Norgren suffered from knee pain. *Id. at 7.*

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[2] Q: Isn't it true that you regarded Ms. Smith as an excellent employee?
A: That's true.
Q: Why was that?
A: She caught on quickly to the task you asked her to do. She did the absolute best job that she could do. And she was not an attendance problem, which we had a few that I could not say that about.
Q: Do you ever recall her missing work regarding her – related to her carpal tunnel?
A: No, I don't.
CABR Gorker 14.

[3] By contrast, Ms. Smith was not referred for surgery for her wrist condition either before or even after her industrial injury and then vocational retraining. This is true even though the retraining caused her wrist condition to become "much worse" than it was prior to her 1997 injury.
CABR Atteridge 32-33. CABR Smith 38.

[4] The Board decision in *Norgren* includes statements supporting multiple treatments for his right knee. For example the following statement: "the use of cortisone injections to treat it on rare occasions is not sufficient." *Norgren*, 2006 WL 481048 *7 (Emphasis added).

Yet, the Board makes clear that the crucial inquiry was not whether Norgren suffered knee pain, but instead the Board focused on whether his right knee pain affected his ability to work as a delivery driver. *Id.* at 6.

Like Ms. Smith and her wrist condition, Norgren's limited medical treatment for his knee condition was stressed by the Board when it determined his bad right knee did not qualify as a pre-existing disabling condition:

> The record contains multiple statements by witnesses that there were few or no pre-injury records for them to refer to or rely on regarding the claimant's pre-injury status. The reason for that is obvious: Mr. Norgren was not seeing doctors regularly for any conditions because he had none that were significant, and certainly none that impaired his ability to work.

Norgren, 2006 WL 481048 *7.

Ms. Smith received even less medical treatment for her wrist condition prior to her industrial injury than Norgren did for his knee. Ms. Smith had her wrist evaluated three or four times over the course of ten weeks in 1994, with the last evaluation showing significant improvement in symptoms. CABR Atteridge 29-30. After this single episode, absolutely no treatment records exist for *any condition* until after her industrial injury on January 10, 1997. CABR Smith 44. No medical doctor put any restrictions on Ms. Smith's ability to work based on her hand or wrist complaints until well after her 1997 injury when she began

vocational retraining and her wrist condition became "much worse." CABR Smith 38. CABR Berndt 19-20; CABR Atteridge 15, 31; CABR Gorker 16.

Contrasting Ms. Smith's wrist condition with Norgren's knee condition, Norgren's condition was medically much more severe. *Norgren,* 2006 WL 481048 *3. In Norgren's case, he had a doctor recommending that he receive a surgery for his right knee prior to his "second" injury. *Id.* Furthermore, his job required him to repetitively use that knee for driving, and he received on-going treatments for his knee when his pain got too great. *Id.*

These facts are in contrast to Ms. Smith who never had a doctor recommend surgery – and in fact never had a doctor require her to wear even wrist splints. CABR Berndt 19-20; CABR Atteridge 15, 31; CABR Gorker 16. Like Norgren, she used the part of her body that caused pain, but unlike Norgren, aside from one course of treatment several years before her accident, she received no on-going medical care for it. CABR Atteridge 29-30. CABR Smith 44.

Presumably, like Norgren, Ms. Smith's pre-existing wrist condition caused her pain, but it did not impact her vocationally. CABR Berndt 28-37. Like Norgren, Ms. Smith's pre-existing wrist condition cannot be considered "disabling" for purposes of second-injury fund relief.

Furthermore, the Board explained in *Norgren* that disability connotes "a loss of earning power." *Norgren,* 2006 WL 481048 *6. And merely proving that one had a prior condition is not proof it was disabling. The Board in *Norgren* instructed that "Something more than [the] existence of prior conditions requiring periodic medical attention was contemplated." *Norgren,* 2006 WL 481048 *6. The Board ultimately focused on how any pre-existing condition impacted Norgren vocationally:

> A review of Mr. Norgren's work history, while not necessarily proving the absence of pre-existing physical or psychological disabilities or limitations that affected his ability to perform work, it is strongly suggestive that no such pre-existing disability was present in this case. He worked medium-duty jobs, averaging over sixty hours per week for over thirty-seven years.

Norgren, 2006 WL 481048, *6 (emphasis omitted). "He worked" - - that is how the Board in *Norgren* established that whatever conditions Norgren might have had prior to his industrial injury those conditions were not disabling. Ms. Smith worked at a production speed job for many years without any accommodation or seeking any medical care. As vocational expert Barbara Berndt described, "This is a production job. It's repetitive. It requires a lot of handling activities. And if she was able to do that and sustain that [in light of her wrist complaints] it doesn't show that there was any disabling condition..." CABR Berdnt 29.

Moreover, even if this Court were to look at Ms. Smith's functioning outside the work place in isolation (which it should not), and were to analyze whether her wrist condition impacted her "ordinary life pursuits" prior to the injury, the evidence would not sustain such a finding of significant impact. The record in this case shows only that Ms. Smith suffered some pain while performing a few personal tasks. While Ms. Smith may have had difficulty with cutting vegetables, mowing her lawn, and doing housework, Ms. Smith neither abstained from the activities nor obtained assistance to cut vegetables, mow her lawn, or do housework. CABR Smith 34. As the vocational expert, Barbara Berndt, noted, Ms. Smith's complaints were insufficient from a vocational perspective to be qualified as disabling prior to her January 10, 1997 industrial injury.

> [A] disabling condition would have required – would have required a doctor asking her to limit the use of her hands or other restrictions in place. . . . We all have complaints as we age and get older, and I can't attribute all of them to her hands. But what I would look for is if she were able to provide documentation that she had help with house or help with the yard and pay for it or delegate it to another family member and she's had to abstain from certain activities.

CABR Berndt 72-73.

Assuming for argument that affect on "ordinary life activities" is to be considered, particularly in isolation, then a standard similar to that of

the Americans with Disabilities Act should set the minimum. See 42 U.S.C. § 12102. At minimum, assuming the stretch under RCW 51.16.120 to include a life activities test, to be disabling the alleged impairment must *substantially* limit at least one major life activity such as walking, seeing, hearing, speaking, breathing, learning, or working. *Id.*[5] Ms. Smith's circumstances fall far short of the ADA disability standard.[6]

It appears that under the employer's proposed standard (as adopted by the superior court in its conclusion of law determining "previous bodily disability"), any person who, by the age of 52, is no longer able to play rugby or tennis would be included, which is clearly not the group of workers intended to be covered by the second-injury fund. RCW 51.16.120. Ms. Smith may have suffered pain, but that pain did not significantly limit her ordinary pursuits of life. Mere pain cannot be

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[5] The ADA's alternative tests for disability discrimination by employers under 42 U.S.C. § 12102 - - employees having a record of disability or being regarded as disabled - - do not appear to be adaptable to RCW 51.16.120 under any stretch of analogy. Those alternative ADA tests are tied to intentional employer discrimination, a proof element that is not relevant to the purely objective "disability" standard of RCW 51.16.120. The second injury fund statute expressly makes irrelevant the employer's prior knowledge of the disability. But even if those alternative ADA tests are considered, Ms. Smith has no record of prior *impairment*, as opposed to a brief period of treatment several years before her 1997 leg injury, and she was not regarded by others as having an impairment prior to her "second injury." CABR Gorker 17.

[6] The vocational expert described what she looked for in analyzing whether a person had a pre-existing disabling condition:

> So when I'm looking for something preexisting, I want to see something that thwarts that person's ability to do jobs or have to accommodate or modify or they're truncated in some aspect of their life because they can't do things. CABR Berndt 36-37.

sufficient to establish a disability and has never been found sufficient by any court in Washington to establish it. Crown failed to establish that Ms. Smith had a preexisting disabling condition.

D. The Department's Interpretation Of The Industrial Insurance Act Deserves Greater Deference Than That Of The Board Of Industrial Insurance Appeals.

The courts give great weight to the Department's interpretation of the provisions of RCW 51. *Dolman v. Dep't of Labor & Indus.*, 105 Wn.2d 560, 566, 716 P.2d 852 (1986). The reason such deference is given to the Department is that the Department is the exclusive, first-line, policy-making agency that the Legislature has tasked with administering the Industrial Insurance Act. *Id.*; *see generally Port of Seattle v. Pollution Control Hr'gs Bd*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004).

Because the Board, on the other hand, is a quasi-judicial review agency, not a policy-making agency, its interpretations of Title 51 RCW should not be given the same deference as is given the Department's

interpretations.[7] *Port of Seattle*, 151 Wn.2d at 593-94; *see also Kaiser Aluminum & Chemical Corp. v. Dep't of Labor & Indus.*, 45 Wn.2d 745, 747-748, 277 P.2d 742 (1954) (explaining the difference between the Department's operational role and the Board's quasi-judicial role).

No reported Washington decision has yet spoken to the question of whether, when there is disagreement between the Department and the Board in interpretation of the compensation provisions of RCW 51, it is the Department, as first-line administrative agency, or the Board, as the quasi-judicial reviewing entity, to whom greater deference should be given. However, it is well-established federal doctrine that only the decisions of policy-making, regulatory agencies are entitled to special deference in statutory interpretation. *See Potomac Electric Power Company v. Director, Office of Workers' Compensation Programs,* 449 U.S. 268, 279, n. 18, 66 L.Ed.2d 446, 101 S.Ct. 509 (1980) (declaring that because the Benefits Review Board under the Federal Longshore Harbor Workers' Compensation Act (Longshore Act) " is not a policy-making

[7] The Department acknowledges that, on occasion, the Washington courts have stated that deference is due the Board's interpretations of Title 51 RCW. However, the Department contends that analysis of the underlying reasons for this rule of construction, as set out above, reveals that such deference to the Board is inappropriate. Also note that such appellate court comments appear to have been made without any consideration of the differing roles of the Department and the Board. *See, e.g., Weyerhaeuser Company v. Tri,* 117 Wn.2d 128, 138, 814 P.2d 629 (1991) (suggesting deference to a Board interpretation, by citing as support *Dolman v. Dep't of Labor & Indus.*, 105 Wn.2d at 566 (1986), a decision in which the Supreme Court in fact deferred to the interpretation of the Department).

agency . . . its interpretation of the [Longshore Act] thus is not entitled to any special deference from the courts"; *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 49 (2d Cir. 1976) (distinguishing between purely "umpiring" or quasi-judicial agencies, on the one hand, and "policy-making" agencies, on the other).

Because the Department is the state-agency equivalent of the "policy-making" agency in the cited Longshore Act cases, while the Board is the state-agency equivalent of the "umpiring," quasi-judicial agency in those cases, it is the Department, not the Board, whose interpretation should be given greater deference here. In *Port of Seattle,* the Washington Supreme Court held that, because the Department of Ecology was the agency that the Legislature had entrusted with administration of the environmental standards, the Court should defer to the Department of Ecology in its interpretation of statutes and its regulations relating to such standards, not to the Pollution Control Hearings Board, the quasi-judicial review agency that reviews Department of Ecology decisions. *Port of Seattle*, 151 Wn.2d at 593-94.

Similarly here, to the extent the Department and Board differ on RCW 51.16.120's narrow exception to employer responsibility, this Court should defer to the Department, not the Board.

E. Neither Substantial Evidence Nor The Findings Of Fact Support The Superior Court's Conclusion Of Law That Ms. Smith Suffered A "Previous Bodily Disability".

Crown sets out extensive excerpts from the trial court's findings of facts.[8] RB 6-7. Crown then argues that substantial evidence supports the findings and that the findings support the trial court's conclusion of law that Crown proved that Ms. Smith suffered from "preexisting bodily disability." RB 10-14. Because, however, there is no evidence and no finding that Ms. Smith's prior wrist condition limited her ability to do her job, the trial court's conclusion of "previous bodily disability" is unsupported and must be reversed.

1. Finding of Fact No. 1: One treatment event, years prior to her industrial injury, does not amount to a disabling condition.

The first finding notes that Ms. Smith had some wrist treatment in 1994.[9] There is no dispute that Ms. Smith's job required constant hand movements, and those movements caused pain. Furthermore, that Ms. Smith's pain led to a single episode of wrist complaints, which consisted

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[8] The Department has attached as Appendix A a copy of the trial court's findings of facts and conclusions of law.

[9] Crown asserts that Ms. Smith took anti-inflammatories prior to her 1997 injury for her wrist condition. RB 11. This assertion is misleading. Dr. Atteridge did testify that the emergency room doctor in 1994 prescribed some anti-inflammatories, but there is no evidence that Ms. Smith had any regimen of treatment after that visit. Dr. Atteridge makes no mention of prescribing any medication for her pain or wrist swelling, and Ms. Smith makes no reference to taking any anti-inflammatories or any other medication for her hand condition prior to her 1997 injury. CABR Atteridge 13; Smith 32-46.

of three or four doctors' visits occurring and ending years before her 1997 accident. CABR 29-30. Of note, finding of fact number one indicates that the splints were given to Ms. Smith, but never prescribed for Ms. Smith.

Merely being given splints does not prove that a person had anything more than a sore wrist. Dr. Atteridge testified that any subjective complaints similar to those of carpal tunnel typically result in a recommendation that a person wear splits, regardless of whether the condition has been diagnosed or whether there is any objective evidence of the condition. CABR Atteridge 32. This finding does not establish that Ms. Smith had a preexisting disabling condition.

2. Findings of Fact No. 3, 10, and 11: Merely showing that Ms. Smith was eligible for a combined effects pension does not establish that her wrist condition, which ultimately worsened and played a role in her total disability, was disabling prior to her 1997 leg injury.

Findings of fact 3, 10, and 11 simply indicate that the employer proved one of the elements necessary to show second-injury fund eligibility: combined effects of the 1997 injury with another condition to cause total disability. Combined effect means that without the combination of some other condition and the new injury the person would not be totally disabled. RCW 51.16.120.

The Department does not dispute that Ms. Smith is totally disabled due to the combined effects of her now-disabling carpal tunnel syndrome, her now-disabling anxiety disorder, and her 1997 industrial injury to her leg. But the Department does dispute that Ms. Smith suffered carpal tunnel syndrome prior to her 1997 industrial injury, and the Department further submits that, even if the syndrome existed prior to her injury, the condition was not disabling. In other words, Ms. Smith's wrist condition acted a lot like Norgren's preexisting conditions that got worse after the final industrial injury. *See, Norgren,* 2006 WL 481048 *7.

Crown asserts that the Department "misstated" the record regarding the evolution of Ms. Smith's carpal tunnel condition. Resp. Brf. 12. Crown is incorrect that the Department misstated the record. The record does establish that Ms. Smith's wrist condition evolved or deteriorated after her industrial injury. Dr. Atteridge testified that the usage of crutches definitely exacerbated her symptoms, and, later in his testimony, he referenced this exacerbation and then related it to her retraining program, which required the use of crutches, causing her condition to evolve. CABR Atteridge 12, 16-17.

The "evolution," meaning deterioration of Ms. Smith's wrist condition, was also confirmed by Ms. Smith herself when she testified that her participation in her post-injury vocational retraining program made her

carpal tunnel symptoms "much worse." CABR Smith 38. The record clearly supports that Ms. Smith's wrist condition had evolved to something "much worse" after 1997 than it was before. CABR Atteridge 12, 16-17. CABR Smith 38.

Findings of fact 3, 10, and 11 show that Ms. Smith's total disability was due to the combined effects of her injury and other conditions. Showing such combined effects does not meet the employer's need to prove that the pre-existing wrist condition was actually disabling prior to the final industrial injury.

3. Finding of Fact No. 4: The evidence shows that Ms. Smith had difficulty performing some tasks in her personal life rather than her work life; however, the evidence does not support that she was unable to perform those tasks and that those difficulties rose to the level of a vocational limitation.

There is no dispute that, consistent with Finding of Fact 4, Ms. Smith had some difficulties with her day-to-day activities such as cutting vegetables, mowing her lawn, and housework. However, these day-to-day tasks were completed without the assistance of relatives or hired help. CABR Berndt 30, 36-37, 72-73. Furthermore, no evidence was presented supporting an assertion that Ms. Smith's hand pain impacted her ability to work, which, as explained above, is required under Washington case law. CABR Gorker 16-17. CABR Berndt 72-73.

Rothschild, 3 Wn. App. at 969-70; *see also In re Funk*, 1991 WL 87432 at *2; *In re Anderson*, 90 WL 310624 at *2.

4. Finding of Fact No. 5: A plant modification made due to numerous workers complaining of wrist pain does not amount to an individualized accommodation made to enable Ms. Smith to carry out her specific work duties.

Finding of fact 5 notes that a modification was made in the work "position" of Ms. Smith and others because of hand and wrist complaints made by the workers. This issue was directly addressed in the Department's opening brief. AB 22-23. Briefly, there is no dispute that the machine Ms. Smith worked on was modified to address the collective concerns of several workers. CABR Smith 41. However, the crucial issue is whether Ms. Smith ever received a job modification for her own physical issues, and the answer is "no." Nothing in the record supports an assertion that this was a modification made specifically for Ms. Smith. Instead, the record reveals this was a company decision made to limit workers' repetitive physical stress.

5. Findings of fact No. 6 & 8: Wearing wrist splints does not amount to Ms. Smith having a vocationally disabling condition, particularly when the wrist splints were never prescribed prior to her industrial injury.

Again, there is no dispute that Ms. Smith chose to wear splints periodically between 1994 and 1997. However, there can be no dispute that prior to her 1997 industrial injury no doctor prescribed them. CABR Berndt 56, 72, 80; Atteridge 8. By hindsight in April of 2006, or over 12 years after his extremely brief treatment of what he described as tenosynovitis, Dr. Atteridge opined during his deposition that ***if*** Ms. Smith had had sought medical care for on-going wrist pain, he would have prescribed splints or placed a restriction on her. CABR Atteridge 21.

Seeking medical care is the best indication of the severity of a condition. Presumably, if Ms. Smith had sought medical care, it would have been because her hand pain was intolerable. Ms. Smith sought no such assistance. Ms. Smith's wrist condition was not severe enough to require medical intervention.

Dr. Atteridge's opinion that he would have made Ms. Smith wear splints had she ever sought medical care for her wrist condition prior to her industrial injury is speculative to say the least, and he assumes a condition which necessitated such medical intervention. The fact that

Ms. Smith wore wrist splints does not prove that she had a preexisting disabling condition.

Crown failed to prove that Ms. Smith had a preexisting disabling condition prior to her 1997 industrial injury.

III. CONCLUSION

The superior court's decision to grant Crown second-injury fund relief is incorrect as a matter of law. Therefore, the Department respectfully requests that this Court reverse and direct the Superior Court to affirm the Board and Department decisions denying second-injury fund relief to Crown.

RESPECTFULLY SUBMITTED this 24th day of July, 2008.

ROBERT M. MCKENNA
Attorney General

NATALEE FILLINGER
WSBA No. 31436
Assistant Attorney General

NO. 36921-4-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES, Appellant, v. CROWN CORK AND SEAL, Respondent.	DECLARATION OF MAILING

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the _____day of July 2008, I delivered the Brief of Appellant Department of Labor and Industries to all parties by ABC Legal Messenger addressed as follows:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Lee Schultz
Law Offices Of Lee Schultz
One Union Square
600 University St. Ste 3018
Seattle, WA 98101-3304

Kathryn C. Comfort
Smart, Snell, Weiss & Comfort P.S.
4002 Tacoma Mall Blvd
Tacoma, WA 98409

DATED this 24th July, 2008.

CYNTHIA RAVES

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

CROWN, CORK & SEAL, PLAINTIFF Vs THE DEPARTMENT OF LABOR AND INDUSTRIES, DEFENDANT	No. 06-2-01952-8 ORDER & JUDGMENT

THIS MATTER having come on for trial pursuant to the plaintiff's appeal in the above noted cause, and the court having presided over this matter on Friday, June 29, 2007 and having heard arguments of counsel and having considered the Board of Industrial Insurance Appeals transcript, the Plaintiff's trial brief, and the Defendant's trial brief, finds as follows:

I. JURISDICTIONAL HISTORY

1.On January 31, 1997 claimant, Sylvia Smith, filed a claim for an injury to her right leg which occurred on January 10, 1997 when a forklift ran over her during the course of her employment with Plaintiff Crown, Cork and Seal Company Incorporated.

2. On February 6, 1997 the Department of Labor and Industries issued an order allowing the claim.

LEE SCHULTZ
ATTORNEY AT LAW
ONE UNION SQUARE
600 UNIVERSITY STREET, SUITE 3018
SEATTLE, WASHINGTON 98101-3304

3. On May 10, 2005 the Department determined Ms. Smith's condition resulting from her industrial injury was stable and further concluded that her industrial injury had resulted in permanent and total disability and directed the self-insured employer Crown, Cork and Seal to place the Plaintiff on the pension rolls effective May 16, 2005.

4. On May 11, 2005 the Department issued another order confirming that in accordance with RCW 51.16.120 Second Injury Fund Relief had been considered and ordered that Second Injury Fund Relief was not applicable in this case.

5. On July 8, 2005 a Notice of Appeal was filed with the Board of Industrial Insurance Appeals on behalf of the Plaintiff, Crown Cork and Seal regarding the Department order of May 11, 2005.

6. On July 17, 2006 a Proposed Decision and Order was issued by Industrial Appeals Judge Ward J. Rathbone of the Board of Industrial Insurance Appeals affirming the Department order of May 11, 2005.

7. The Plaintiff employer thereafter filed a timely Petition for Review of the Proposed Decision and Order and on September 22, 2006 the Board of Industrial Insurance Appeals denied said Petition for Review thereby adopting the earlier issued Proposed Decision and Order.

8. On October 17, 2006 Plaintiff Crown, Cork and Seal timely filed an appeal of the Board of Industrial Insurance Appeals order of September 22, 2006 in Thurston County Superior Court.

II. FINDINGS OF FACT

1. Claimant Sylvia M. Smith was born on January 19, 1945. In November 1980 she started employment with Plaintiff, Crown, Cork and Seal Company Incorporated. Her work demanded constant repetitive movement of her hands. In January 1994 she experienced pain in her left and right wrists and swelling in both arms. She sought medical treatment at Providence St. Peters emergency room and received wrist splints/braces to wear while working and sleeping. She later on January 31, 1994 conferred with Dr. Sean Atteridge an osteopath who was certified in family practice concerning the pain in her wrists and forearms.

2. Vocational counselor Erin McPhee testified on behalf of the Plaintiff, and the court finds, that Ms. Smith's carpal tunnel condition which pre-existed the industrial injury became an issue in particular as they began the vocational retraining process which ultimately resulted in the failure of two retraining programs.

LEE SCHULTZ
ATTORNEY AT LAW
ONE UNION SQUARE
600 UNIVERSITY STREET, SUITE 3018
SEATTLE, WASHINGTON 98101-3304
TEL (206) 447-9880 · FAX (206) 447-6935

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SEATTLE, WASHINGTON 98101-3304
TEL (206) 447-9880 · FAX (206) 447-6935

3. Erin McPhee, further testified, and the court finds, that the inability to retrain Ms. Smith resulted directly from her pre-existing carpel tunnel syndrome conditions and her industrial injury.

4. The claimant, Ms. Smith, testified, and the court finds, that prior to her industrial injury her bilateral carpal tunnel conditions caused difficulty with day to day activities such as cutting vegetables, mowing her lawn, and most of her house work.

5. Smith further testified, and the court finds, that the position she performed with Plaintiff Crown, Cork and Seal had been modified prior to her industrial injury because of wrist and hand complaints made by her and her fellow workers.

6. Smith also testified, and the court finds, that although she did not seek active medical treatment between 1994 and her industrial injury in 1997 she wore her wrist splints during that entire period of time.

7. Douglas Gorker Ms. Smith's direct supervisor at Crown, Cork and Seal testified, and the court finds,that Ms. Smith had complained to him personally of hand and wrist pain prior to her industrial injury. Mr. Gorker confirmed that Ms. Smith's job at Crown, Cork and Seal had been modified to mitigate carpal tunnel syndrome complaints made by her and her fellow employees prior to the time of her industrial injury.

8. Sean Atteridge, DO Ms. Smith's attending physician testified, and the court finds, that Ms. Smith was wearing splints for her wrist complaints and he agreed that she should in fact wear such splints for the symptoms she was experiencing between 1994 and her industrial injury in 1997 and beyond.

9. Dr. Atteridge testified, and the court finds, that regarding Smith's ability to work she would be limited in her ability to walk as well as spend extended time without her injured leg being elevated. He further testified that she should avoid repetitive movements of her wrists, keyboarding, and any repetitive hand movement or lifting.

10. Dr. Atteridge testified, and the court finds, that in his opinion Smith is totally and permanently disabled as of May 10, 2005 due in part to her industrial injury of January 10, 1997 and due in part to her pre-existing carpal tunnel syndrome. Dr. Atteridge's medical opinion is undisputed by any other medical testimony.

11. Dr. Atteridge testified, and the court finds, that Smith's severe industrial injury involving her leg makes her unable to work in any capacity other than a sedentary office type position, and that due to her pre-existing bilateral carpal

LEE SCHULTZ
ATTORNEY AT LAW
ONE UNION SQUARE
600 UNIVERSITY STREET, SUITE 3018
SEATTLE, WASHINGTON 98101-3304
TEL (206) 447-9880 · FAX (206) 447-6935

tunnel conditions she is unable to perform this type of work or be trained in these types of jobs.

12. Prior to the industrial injury Ms. Smith's pre-existing bilateral carpal tunnel syndrome did not cause her to miss work nor did it require further accommodation at work in ways not provided to other employees performing her job except that she wore bi-lateral wrist splints in order to perform her work activities. Ms. Smith was considered a good employee and there was no evidence that would demonstrate otherwise and she advanced according to the union pay scale.

III. CONCLUSIONS OF LAW

1. The Superior Court of the State of Washington in and for Thurston County has jurisdiction over the parties and the subject matter of this appeal.

2. Findings of Facts 5, 6, 7 and 8 and Conclusions of Law 2, 3 and 4 in the July 17, 2006 Proposed Decision and Order later accepted by the Board upon their denial of the Plaintiff's Petition for Review are incorrect and are hereby reversed.

3 .The Industrial Appeals Judge and the Board of Industrial Insurance Appeals under estimated the disability caused to Ms. Smith by her pre-existing carpal tunnel syndrome condition and the effect that that disability had on Ms. Smith's likelihood of benefiting from vocational retraining.

4. Ms. Smith's bilateral carpal tunnel conditions pre-existing her industrial injury constituted a "previous bodily disability " within the meaning of RCW51.16.120(1) and when combined with the effects of the claimant's industrial injury of January 10, 1997 caused the claimant to be permanently and totally disabled, and the self-insured employer, is therefore entitled to Second Injury Fund Relief pursuant to RCW51.16.120.

5. This claim is remanded to the Washington State Department of Labor and Industries. The Department is instructed to issue an order reversing its order of May 11, 2005 and to allow the Plaintiff self-insured employer herein Crown, Cork and Seal Company Incorporated Second Injury Fund Relief, and take such further action as is indicated by law and the facts.

IT IS SO ORDERED.

LEE SCHULTZ
ATTORNEY AT LAW
ONE UNION SQUARE
600 UNIVERSITY STREET, SUITE 3018
SEATTLE, WASHINGTON 98101-3304
TEL (206) 447-9880 · FAX (206) 447-6955

Dated this 25th day of September 2007.

GARY R. TABOR

Honorable Judge Gary Tabor
Superior Court of the State of Washington
In and for the County of Thurston

Presented by:

LEE SCHULTZ
Attorney for the Plaintiff

Copy Received
Notice of Presentation of Waiver;

NATALEE FILLINGER, AAG.
Attorney for the Department of
Labor & Industries

LEE SCHULTZ
ATTORNEY AT LAW
ONE UNION SQUARE
600 UNIVERSITY STREET, SUITE 3018
SEATTLE, WASHINGTON 98101-3304
TEL (206) 447-9880 · FAX (206) 447-6935